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No. 08-1251

Supreme Court, U.S.
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**In The
Supreme Court of the United States**

BURRISS ELECTRICAL, INC.,

Petitioner,

v.

OFFICE OF OCCUPATIONAL SAFETY AND
HEALTH, SOUTH CAROLINA DEPARTMENT
OF LABOR, LICENSING, AND REGULATION,

Respondent.

**On Petition For Writ Of Certiorari To The
South Carolina Court Of Appeals**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED FOR REVIEW

This Court should deny Burriss Electrical's Petition for a Writ of Certiorari. However, if this Court grants the Petition, the single question for review should be as follows:

Is the South Carolina Occupational Health and Safety Review Board's finding that Burriss Electrical's admitted violation of S.C. Code Regs. § 71-I-1926.651(k)(1) was "willful" supported by substantial evidence?

This Court should deny Burriss Electrical's Petition for a Writ of Certiorari for the initial reason that Burriss Electrical fails to articulate a Question Presented that states with brevity or clarity, and without repetition, the issue it wishes this Court to consider. *See* Sup. Ct. R. 14.4 ("The failure of a petitioner to present with . . . brevity[] and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition."); Sup. Ct. R. 14.1(a) ("The questions [presented] should . . . not be . . . repetitive.").

Burriss Electrical's Petition for a Writ of Certiorari states three proposed Questions Presented:

- 1) Did the Court of Appeals err in finding that Burriss knowingly violated OSHA and deliberately subjected employees to serious risk of harm based on a prior OSHA

**QUESTION PRESENTED
FOR REVIEW – Continued**

citation that had been withdrawn and involved very dissimilar facts?

2) Did the Court of Appeals ignore uncontested evidence that Burriss had no appreciation of the OSHA standards, or the danger, and therefore could not have willfully violated OSHA?

3) Did the Court of Appeals incorrectly find that Burriss deliberately ignored OSHA when, in fact, the uncontroverted evidence is that Burriss was very careful about the safety issues it knew about?

These three questions each address the same issue, with each emphasizing a different piece of evidence, or purported lack thereof. By stating in three questions what is really a single issue, Burriss Electrical's Questions Presented fail to present with brevity and clarity, and without repetition, the information needed for a ready and adequate understanding of the issue in this case. For this initial reason, and others set forth below, this Court should

**QUESTION PRESENTED
FOR REVIEW – Continued**

deny Burriss Electrical's Petition for a Writ of Certiorari.¹

¹ Burriss Electrical's proposed Questions Presented also misapprehend the nature of appellate review of administrative agency decisions. Specifically, they suggest that the South Carolina Court of Appeals made factual findings. In reality, the South Carolina Court of Appeals made no factual findings. *Burriss Elec., Inc. v. Office of Occupational Safety and Health*, Unpublished Opinion No. 2008-UP-070 (S.C. Ct. App. Jan. 23, 2008) (per curiam) (included in Appendix to Burriss Electrical's Petition). Rather, it reviewed a finding of the South Carolina Occupational Health and Safety Review Board (the "Board") to determine if that finding was supported by substantial evidence. *Id.*; see also S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). Likewise, if this Court grants Burriss Electrical's Petition, it will not make independent findings, but instead also determine only whether the Board's finding was supported by substantial evidence. *Arkansas v. Oklahoma*, 503 U.S. 91, 112-13, 112 S. Ct. 1046, 1060 (1992).

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STATEMENT OF THE CASE

Death of Two Employees

Two employees of Burriss Electrical were killed when the vertical wall of a six- to eight-foot deep earthen trench they were working in collapsed and buried them. (R. 28, lines 21-25; R. 29, lines 1-3; R. 32, lines 16-23; R. 161.) The employees had been hired at the job site the previous day. (R. 44, line 20-21; R. 102, lines 19-25.) They were not provided with helmets to wear while in the trench (R. 47, lines 18-25; R. 48, lines 1-18), and Burriss Electrical admitted that it "basically hadn't provided any training to employees that were in the trench" (R. 33, lines 10-11; R. 32, lines 7-8; R. 44, lines 20-23; R. 45, lines 3-5).

The Trench

Burriss Electrical dug the trench in order to run an electrical conduit while working on a new high school in Blythewood, South Carolina. (R. 78, lines 16-20; R. 81, lines 15-24.) The trench ran for 121 feet, about eighty of which was between six and eight feet deep. (R. 32, lines 16-23; R. 161-64.) Thomas Burriss, the project manager, saw the trench only after the cave-in and was "extremely shocked to see that ditch that deep." (R. 77, lines 7-14; R. 84, lines 8-20.) He said that "[i]t was horrifying" and "dangerous." (R. 84, lines 16-17, 25.) He testified that had he been at the site he "would have told people to get out of [the] ditch." (R. 84, lines 22-23.) "There's just no way [he]

would have exposed anybody to that." (R. 84, lines 23-24.)

Notwithstanding the plain danger posed by the trench, Burriss Electrical had no system in place to shore up the walls and prevent cave-ins. (R. 55, lines 22-25; R. 56-57.) Nor had Burriss Electrical provided any ladder, ramp, or other means of exit from the trench in the eighty-foot stretch that was six to eight feet deep. (R. 32, lines 19-23; R. 51, lines 20-23.) The only means of egress from the trench was on one end where it "had been filled in somewhat to bring the bottom . . . to within about 42 inches of the surface of the ground." (R. 52, lines 9-19.)

Burriss Electrical's Safety Program

During its ten years in business prior to this cave-in, Burriss Electrical never obtained for itself a copy of the State's construction safety regulations. (R. 79, line 4; R. 103, line 25; R. 104, lines 1-17.) As to safety training, Thomas Burriss explained:

We had training on fall protection. We discussed heat-related injuries, and I would visit the jobsites a lot of times and would communicate to the guys, say I feel like there's a potential here of a problem. If there's conduit stubbed up and, you know, it's open where somebody could fall on it and impale themselves or tripping hazard, stuff like that.

(R. 80, lines 22-25; R. 81, lines 1-4.) He later testified that they also “discussed various hazards with electrocution.” (R. 103, lines 1-9.) It is not clear, however, where such training took place or how formal it was since Burriss Electrical experienced a high turnover rate with respect to about half of its roughly eighty employees (R. 79, lines 8-9; R. 107, lines 6-18), and since employees were often hired at job sites and not required to report to the company’s office (R. 80, lines 20-25; R. 81, lines 1-4; R. 102, lines 6-25). Moreover, Thomas Burriss visited each job site, on average, only “once a week at least.” (R. 78, lines 8-10.) Although he said that the employees at each site were required to attend any safety meetings held by the general contractor at the site, he conceded that not all general contractors held such meetings (R. 103, lines 9-24).

Prior Citations

In August of 2000, two and a half years prior to the incident giving rise to this case, Respondent, the Office of Occupational Safety and Health in the South Carolina Department of Labor, Licensing and Regulation (the “Department of Labor”), issued two citations to Burriss Electrical. (R. 90, lines 15-19; R. 168-69.) At that time, Burriss Electrical was working on a site where it had erected scaffolding and dug a trench. (R. 86, lines 15-25; R. 87, lines 1-9; R. 89, lines 19-25; R. 90, lines 1-14.) With respect to the scaffolding, the Department of Labor cited Burriss Electrical for failure to install a guardrail along the scaffolding platforms, classified the violation as “serious,” and

proposed a \$300 fine. (R. 108, lines 15-19; R. 168.) With respect to the trench, the Department of Labor cited Burriss Electrical for failure to comply with S.C. Code Regs. § 71-I-1926.651(k)(1), which requires in relevant part (1) “[d]aily inspections of excavations [and] the adjacent areas . . . for evidence of a situation that could result in possible cave-ins . . . or other hazardous conditions,” and (2) that the inspections “be made by a competent person.” (R. 169.) The Department of Labor classified this violation as “other than serious” and did not impose a fine therefore. (R. 108, lines 19-25; R. 109, line 1; R. 169.)

Burriss Electrical protested the citation for the scaffolding violation and eventually entered a settlement agreement wherein it agreed to pay a \$120 fine and “provide refresher training for its employees in fall protection.” (R. 165-76, 170.) Burriss Electrical paid little attention to the citation for the trenching violation: Thomas Burriss testified, “Since there was no penalty I didn’t protest it.” (R. 86, lines 10-25; R. 109, lines 1-11.)

Failure to Comply With Known Trenching Regulations

Despite having been cited for multiple violations of State safety regulations, the only action Burriss Electrical took was to conduct the refresher training mandated by the settlement agreement, including showing to its employees a fall protection video. (R. 90, lines 20-25; R. 91, lines 1-4.) Burriss Electrical did

not bother, even at this time, to obtain or read a copy of the State construction safety regulations. (R. 103, line 25; R. 104, lines 1-17.)

Burriss Electrical's project manager, Thomas Burriss, did, however, read the August 2000 trenching violation citation:

Q. ... To whom [d]o OSHA violations, alleged OSHA violations, or citations therefor[] come to?

A. Usually they just come in the mail registered or certified and either myself or somebody at the office signs for them, but I would say I would be the one that would read them and react to those.

Q. Do you deny having seen this document before, the [August 2000 trenching] citation?

A. No, sir, I don't deny it.

Q. So at least at the time of receipt of this citation that we're talking about, the 2000 citation, you were aware of 1926.651(k)(1); is that correct?

A. I don't know if I'd say I was aware of, but I've seen the document, yes, sir.

Q. And the document discusses that standard, correct?

A. That's correct, yeah.

Q. And would it normally be your practice to read citations?

A. Yes, it would. You know, I read this – I'm pretty sure the way I feel I read this document, and under "A" I guess on the bottom of the document it says, "A. No competent person on site knowledgeable in soil analysis, trenching system, and the trenching standard." Basically the way I interpreted it at the time of this document and before this accident, that we did not have a competent person on site, and a competent person – now that I know what a competent person definition is by OSHA and my competent person definition are two different things. . . .

(R. 96, lines 6-25; R. 97, lines 1-11.)

At the time of the cave-in, Thomas Burriss, with apparent recollection of the requirements of S.C. Code Regs. § 71-I-1926.651(k)(1), was relying on his job site superintendent, David Marshall,² to fulfill the requirements of the safety regulation:

Q. Having previously been exposed to the standards for excavations and inspections thereof, did you insure that someone went out there and inspected that trench?

² Marshall was one of two superintendents at the August 2000 job site where Burriss Electrical was first cited for failure to have a competent person. (R. 97, lines 24-25; R. 98, lines 1-10.)

A. I was expecting my person, David Marshall, to be in charge of inspecting that trench, yes, sir.

Q. Who does Mr. Marshall report to?

A. To myself.

Q. Prior to the accident, did you have any conversations with Mr. Marshall as to whether or not he was making sure that trench was according to specs?³

A. We talked about the trench being different variances of width and how we were going to do it because of we had different electrical rooms that we had to feed. We talked many different ways of how we were going to do it, but never came to really a conclusion of how we were going to actually finally get it done.

Q. Did you talk about daily inspections of the adjacent areas?

A. No, sir.

Q. Did you talk about daily inspections of protective systems?

A. No, sir.

Q. Did you talk about whether Mr. Marshall was a competent person or he had a competent person?

³ Marshall and Thomas Burriss spoke with each other "two or three times a day." (R. 105, lines 15-18.)

A. No, sir. I didn't talk about it but I felt like he was a competent person upon my definition before the accident.

Q. So you felt that he would be able to recognize evidence of a situation that could result in possible cave-ins, indications of failure or protective systems, and hazardous conditions?

A. Yes, sir.

(R. 99; R. 100; R. 101, lines 1-4.)

However, neither Marshall nor Thomas Burriss met the regulatory definition of "competent person." (R. 62; R. 63, lines 1-2.) Neither was trained with respect to trench wall protective systems (R. 62, lines 16-20), and Marshall did not know of the daily trench inspection requirement (R. 70, line 25; R. 71, lines 1-4). Not surprisingly, therefore, Marshall did not conduct any soil analysis, shore up the trench walls, or conduct inspections of the trench and adjacent areas, as required by S.C. Code Regs. § 71-I-1926.651(k)(1). (R. 60-63; 99-100; 101, lines 1-3.) Thomas Burriss did not even visit the site to see the trench until after the cave-in. (R. 83, lines 11-18; R. 84, lines 8-17.)

It Took a Double Fatality

Burriss Electrical did not have a copy of the State's workplace safety regulations during its first seven years in business. (R. 103, line 25; R. 104, lines 1-17.) It did not obtain a copy after being cited for

violations of those regulations (*id.*), and it did not substantially change its safety program after that time (R. 90, lines 20-25; R. 91, lines 1-10; R. 103). Nor did it subsequently follow the trenching regulations that had been brought to its attention. (R. 60-64.) Rather, Thomas Burriss testified that it took the death of two company employees for him to realize his role, as project manager, to ensure compliance with workplace health and safety regulations:

Q. In your capacity as [project] manager, what is your position regarding what responsibility, if any, you have to know the rules and regulations governing occupational safety and health in your workplace?

A. . . . I feel like this accident has made me realize that I'm the one that is responsible for safety.

(R. 95, lines 16-25.)

Procedural History

The South Carolina Department of Labor investigated the double fatality and cited Burriss Electrical for four "serious" violations of various regulations (R. 2, 28, 45-49), and Burriss Electrical admitted those violations (R. 2-3). The South Carolina Department of Labor also issued to Burriss Electrical one citation for a "willful" violation of S.C. Code Regs. § 71-I-1926.651(k)(1), the section requiring a competent person to conduct daily inspections of any trench site

and its adjacent areas. (R. 2-3, 59-67.) Burriss Electrical has never disputed that it violated section 71-I-1926.651(k)(1). (See, e.g., R. 12 n.2.) However, it has, at every stage of this case, contested the classification of that violation as “willful.” (See, e.g., *id.*)

Burriss Electrical first filed a Notice of Protest to the citation, and a hearing was held before Elaine L. Craft of the South Carolina Occupational Health and Safety Review Board. (R. 12.) Board Member Craft’s order upheld the “willful” classification. (R. 9.) Burriss Electrical then filed a Petition for Review by the entire Board, which the Board denied, upholding Board Member Craft’s order. (R. 12.) Burriss Electrical then appealed to the South Carolina Court of Common Pleas, which affirmed Board Member Craft’s order. (R. 12, 21.) Burriss Electrical then appealed to the South Carolina Court of Appeals, which also affirmed the finding of a “willful” violation. *Burriss Electrical, Inc. v. Office of Occupational Safety and Health*, Unpublished Opinion No. 2008-UP-070 (S.C. Ct. App. Jan. 23, 2008) (per curiam) (included in the appendix to Burriss Electrical’s Petition for a Writ of Certiorari). Burriss Electrical filed a Petition for Rehearing in the Court of Appeals. (Appendix to Burriss Electrical’s instant Petition.) When that petition was denied, Burriss Electrical filed a Petition for a Writ of Certiorari in the South Carolina Supreme Court. (*Id.*) That petition was also denied (*id.*), and Burriss Electrical then filed the instant Petition with this Court.

ARGUMENT

I. THIS COURT SHOULD DENY BURRISS ELECTRICAL'S PETITION FOR A WRIT OF CERTIORARI BECAUSE THE COURT LACKS JURISDICTION.

The rules of this Court require a petitioner for a writ of certiorari to identify "the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question." Sup. Ct. R. 14.1(e)(iv). If the petition is for review of a state court judgment, the rules also require a petitioner to "show that [a] federal question was timely and properly raised" in the state court. Sup. Ct. R. 14.1(g)(i). Burriss Electrical's Petition fails to comply with either of these requirements (Petition for a Writ of Certiorari, pp. 3-4) and the Court should deny Burriss Electrical's Petition, on that basis, *Dept. of Mental Hygiene of Cal. v. Kirchner*, 380 U.S. 194, 197, 85 S. Ct. 871, 873 (1965) ("This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.")

Burriss Electrical's failure to show that a federal question was raised in the state court is due to the fact that there was no federal question raised in the state court. This case involves only the application of a South Carolina state regulation, S.C. Code Regs. § 71-I-1926.651(k)(1). *Burriss Electrical, Inc. v. Office of Occupational Safety and Health*, Unpublished Opinion No. 2008-UP-070 (S.C. Ct. App. Jan. 23,

2008) (per curiam) (included in the Appendix to Burriss Electrical's Petition for a Writ of Certiorari). "Authority for the Federal Government to decide questions of state law exists only by virtue of the Diversity Clause in Article III." *Glidden Co. v. Zdanok*, 370 U.S. 530, 537-38, 82 S. Ct. 1459, 1466 (1962). Because this case involves only the application of a South Carolina state regulation, and because there is no diversity of citizenship between the parties, this Court lacks jurisdiction over this case and should therefore deny Burriss Electrical's Petition.⁴

⁴ Burriss Electrical made no assertion below that S.C. Code Regs. § 71-I-1926.651(k)(1) operates in an area preempted by federal law, and such an assertion would be unavailing in any event. Section 71-I-1926.651(k)(1) is part of South Carolina's Occupational Safety and Health Regulations. See S.C. Code Ann. § 41-15-210 (Supp. 2008); S.C. Code Regs. § 71-100 *et seq.* Congress granted states the opportunity to implement their own plans for the enforcement of occupational safety and health standards. 29 U.S.C. § 667(b) (2006). Once such a state plan is approved by the United States Secretary of Labor, the state plan "displaces the federal [OSHA] standards," and federal law no longer preempts that state's regulations. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 97-99, 112 S. Ct. 2374, 2382-83 (1992). South Carolina's occupational safety and health plan received final approval from the Secretary of Labor on December 15, 1987, 29 C.F.R. § 1952.94 (2008), and, therefore, federal occupational safety and health standards no longer apply in South Carolina, 29 C.F.R. § 1952.95 (2008); *Gade*, 505 U.S. at 97-99, 112 S. Ct. at 2382-83. Thus, an assertion of a federal question arising in this case by virtue of federal preemption would be unavailing.

II. THIS COURT SHOULD DENY BURRISS ELECTRICAL'S PETITION FOR A WRIT OF CERTIORARI BECAUSE BURRISS ELECTRICAL FAILS TO PRESENT A COMPELLING REASON FOR A GRANT OF CERTIORARI IN THIS CASE.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion," and this Court will grant a petition for a writ of certiorari "only for compelling reasons." Sup. Ct. R. 10. When a petitioner seeks review of a state court decision, it typically must show that the state court decided "an important question of federal law." Sup. Ct. R. 10(c). This Court will "rarely" grant a petition for a writ of certiorari "when the asserted error consists [merely] of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Even if this case presented a federal question, Burriss Electrical fails to show that there is a compelling reason for a grant of certiorari in this case.

The South Carolina Occupational Health and Safety Review Board (the "Board") found that Burriss Electrical's admitted violation of S.C. Code Regs. § 71-I-1926.651(k)(1) was "willful." The South Carolina Court of Common Pleas affirmed that finding, and the South Carolina Court of Appeals likewise concluded that the Board's finding was supported by substantial evidence. In so holding, the South Carolina Court of Appeals explained that "[a]n act may be 'willful' if the offender shows 'indifference' to the rules; he need not be consciously aware that the

conduct is forbidden at the time he performs it, but his state of mind must be such that, if he were informed of the rule, he would not care.’” *Burriss Electrical, Inc. v. Office of Occupational Safety and Health*, Unpublished Opinion No. 2008-UP-070 (S.C. Ct. App. Jan. 23, 2008) (per curiam) (citation omitted) (included in Appendix to Burriss Electrical’s Petition, p. 24).

Burriss Electrical does not assert that the South Carolina Court of Appeals applied the wrong rule of law when it reviewed the Board’s factual finding. In fact, in its Petition for a Writ of Certiorari, Burriss Electrical articulates in terms substantively equivalent to those used by the South Carolina Court of Appeals the relevant legal rule: “A ‘willful violation’ should be (and is) reserved for employers who either *knowingly* violate OSHA or for employers who *unknowingly* violate OSHA but the evidence shows they would have violated it even if they had known of OSHA requirements.” (Petition for a Writ of Certiorari, p. 5.) Burriss Electrical then asserts simply that, under the South Carolina Court of Appeals’ properly stated definition of willfulness, there was insufficient evidence to support a finding that its violation of S.C. Code Regs. § 71-I-1926.651(k)(1) was “willful.” In other words, the error that Burriss Electrical asserts occurred consists of erroneous factual findings based on the alleged misapplication of a properly stated rule of law.

Burriss Electrical has already presented this argument in two prior levels of appellate review – one

in the South Carolina Court of Common Pleas, and one in the South Carolina Court of Appeals. The South Carolina Supreme Court declined to grant a third round of review. The scarce resource that is this Court's exercise of certiorari review should not be used simply to grant a particular party in state court litigation a third chance to challenge a state agency's factual finding, especially when the state's own highest court has declined to grant such review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Moreover, the South Carolina Court of Appeals' decision in this matter is unpublished and, therefore, may not be relied upon as precedent in future South Carolina cases. S.C. App. Ct. R. 239(d)(2). Burriss Electrical's assertion about what will surely follow "[i]f the lower decisions in this case are allowed to stand," fails to account for the fact that none of the lower decisions in this case are binding or can even be cited in future South Carolina cases. (Petition for a Writ of Certiorari, p. 5.) Thus, even if this case presented a federal question (and it does not), Burriss Electrical fails to give a compelling reason for this Court to review a state court opinion that has no precedential effect, even in the state where it was issued. Hence, this Court should deny Burriss Electrical's Petition for the additional reason that there is no compelling reason for this Court's grant of certiorari review in this case. *See* Sup. Ct. R. 10.

III. THIS COURT SHOULD DENY BURRISS ELECTRICAL'S PETITION FOR A WRIT OF CERTIORARI BECAUSE BURRISS ELECTRICAL FAILS TO STATE WITH ACCURACY THE EVIDENTIARY INFORMATION ESSENTIAL TO A READY AND ADEQUATE UNDERSTANDING OF THE POINTS IT WISHES THIS COURT TO CONSIDER.

"The failure of a petitioner to present with accuracy . . . whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition [for certiorari]." Sup. Ct. R. 14.4. Burriss Electrical's Petition for a Writ of Certiorari contains sweeping and material assertions about the evidence that are not supported by the record. Thus, even if the Court concludes that Burriss Electrical's Petition for a Writ of Certiorari presents an important and federal question, it should still deny the Petition because Burriss Electrical has failed to state with accuracy the evidentiary information essential to a ready and adequate understanding of the points it wishes this Court to consider. *See id.*

Specifically, in the second of its proposed Questions Presented, Burriss Electrical asserts that there is "uncontested evidence that Burriss had no appreciation of the OSHA standards." Burriss Electrical essentially repeats this assertion elsewhere in its Petition:

Unbeknownst to Burriss, the trench was unsafe under OSHA standards for several

reasons[,] . . . [including that] OSHA requires a "competent person" . . . to inspect the trench daily.

(Petition for a Writ of Certiorari, p. 6.)

Likewise, they were not aware of the need to have a "competent person" . . . inspect the trench.

(Petition for a Writ of Certiorari, p. 7.)

There is flatly no evidence that Burriss ignored knowledge gained from a prior citation.

(Petition for a Writ of Certiorari, p. 13.)

These assertions are belied by the record. The testimony of Thomas Burriss himself is that prior to the incident giving rise to this case he had received and read the August 2000 citation for failure to have a competent person inspect a trench:

Q. . . . To whom [d]o OSHA violations, alleged OSHA violations, or citations therefor[] come to?

A. Usually they just come in the mail registered or certified and either myself or somebody at the office signs for them, but I would say I would be the one that would read them and react to those.

Q. Do you deny having seen this document before, the [August 2000 trenching] citation?

A. No, sir, I don't deny it.

Q. So at least at the time of receipt of this citation that we're talking about, the 2000 citation, you were aware of 1926.651(k)(1); is that correct?

A. I don't know if I'd say I was aware of, but I've seen the document, yes, sir.

Q. And the document discusses that standard, correct?

A. That's correct, yeah.

Q. And would it normally be your practice to read citations?

A. Yes, it would. You know, I read this – I'm pretty sure the way I feel I read this document. . . .

(R. 96, lines 6-25; R. 97, line 1.) Thomas Burriss went on to explain that he not only "read" but also "interpreted" the August 2000 trenching citation: "Basically, the way I interpreted it at the time of this document and before this accident" (R. 97, lines 5-6.) That he both "read" *and* "interpreted" the August 2000 trenching citation "at the time," in 2000, is evidence that Burriss Electrical knew before the Blythewood incident of the requirement to have a competent person perform daily trench inspections. Indeed, further testimony from Thomas Burriss evidences that he remained aware of the trenching regulations through the time of the Blythewood cave-in:

Q. Having previously been exposed to the standards for excavations and inspections thereof, did you insure that someone

went out there and inspected that trench?

- A. I was expecting my person, David Marshall, to be in charge of inspecting that trench, yes, sir.

....

- Q. Did you talk [with Marshall] about whether [he] was a competent person or he had a competent person?

- A. No, sir. I didn't talk about it but I felt like he was a competent person upon my definition before the accident.

- Q. So you felt that he would be able to recognize evidence of a situation that could result in possible cave-ins, indications of failure or protective systems, and hazardous conditions?

- A. Yes, sir.

(R. 99, lines 1-6; R. 100, lines 4-13.) This testimony suggests that *at the time of the Blythewood project* Thomas Burriss "felt" and "was expecting" the need for trench inspections, and the need for a "competent person" to conduct those inspections. Yet it is uncontested that Burriss Electrical did not cause there to be any trench inspections, by a competent person or otherwise. Given the foregoing testimony of Thomas Burriss himself, the assertions in Burriss Electrical's Petition for a Writ of Certiorari that there is "uncontested evidence that Burriss had no appreciation of the OSHA standards," that it was "not

aware of the need to have a 'competent person' . . . inspect the trench," and that "[t]here is flatly no evidence that [it] ignored knowledge gained from a prior citation" (Petition for a Writ of Certiorari, pp. 6, 7, 13), are inaccurate, to say the least.

Burriss Electrical's second proposed Question Presented contains the additional assertion, repeated elsewhere in the Petition, that there is "uncontested evidence that Burriss had no appreciation of . . . the danger." (Petition for a Writ of Certiorari, pp. 6, 7.) But Thomas Burriss testified that the Blythewood trench was plainly "horrifying" and "dangerous." (R. 84, lines 16-17, 25.) He testified that "[t]here's just no way [he] would have exposed anybody to that," and that had he been at the Blythewood site he "would have told people to get out of [the] ditch." (R. 84, lines 22-24.) While Thomas Burriss did not see the Blythewood trench until after the accident (R. 83, lines 11-18; R. 84, lines 8-17), his job site superintendent, David Marshall, saw it repeatedly (see R. 99; R. 100; R. 101, lines 1-4; R. 105, lines 15-18), and his observations must be imputed to the company, *Ga. Elec. Co. v. Marshall*, 595 F.2d 309, 318 (5th Cir. 1979) (holding that the company, "through its foreman, made its choice" not to shore a trench); *Sec. of Labor v. Sinisgalli*, 17 OSHC 1849, 1852, OSHRC Docket No. 94-2981 (May 23, 1996) ("The foreman was aware of the excavation's condition. His knowledge is imputed to the employer."). Thomas Burriss testified that he "felt that [Marshall] would be able to recognize evidence of a situation that could result in

possible cave-ins." (R. 100, lines 4-18.) In light of this testimony, Burriss Electrical cannot now credibly contend that, although Thomas Burriss recognized the trench to be plainly "horrificing," "dangerous," and one that no one should be exposed to, its site superintendent would not have likewise recognized the plain danger. Hence, Burriss Electrical's assertion of "uncontested evidence" that it was not aware of the danger is also inaccurate.

Finally, Burriss Electrical's third proposed Question Presented asserts that "the uncontroverted evidence is that Burriss was very careful about the safety issues it knew about." Yet, although Burriss Electrical knew that it was required to give safety training to its employees (see R. 80, lines 22-25; R. 81, lines 1-4; R. 90, lines 20-25; R. 91, lines 1-4), it admits that it put two employees who had been hired at the job site the previous day into an eight-foot deep earthen trench without giving them any training (R. 28, lines 21-25; R. 32, lines 7-8, 16-23; R. 33, lines 10-11; R. 44, lines 20-23; R. 45, lines 3-5; R. 102, lines 19-25; R. 161). Thus, the assertion of there being uncontested evidence that Burriss Electrical was very careful about the safety issues it knew about is also inaccurate.

Burriss Electrical's inaccurate assertions about the evidence are not trivial. Rather, they go to the heart of the issue it wants this Court to review, i.e., whether there is substantial evidence to support a conclusion that it willfully violated the requirement that it cause daily inspections of its trench by a

competent person. Indeed, Burriss Electrical even proposes three Questions Presented instead of a single issue statement apparently for the precise purpose of making multiple (mistaken) assertions about the “uncontested” and “uncontroverted” evidence. Not surprisingly, it is exactly the evidence that Burriss Electrical makes inaccurate assertions about – its prior knowledge of the requirement for a competent person to conduct daily trench inspections, and of its disregard of known safety issues and the plain dangers of the Blythewood trench – that amounts to substantial evidence in support of the Board’s finding of willfulness.

Again, “[t]he failure of a petitioner to present with accuracy . . . whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition [for certiorari].” Sup. Ct. R. 14.4. Accordingly, this Court should deny Burriss Electrical’s Petition for a Writ of Certiorari because it is plagued by material inaccuracies regarding the evidence.

CONCLUSION

For each of the foregoing reasons, this Court should deny Burriss Electrical's Petition for a Writ of Certiorari.

Respectfully submitted,

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